Eagle-Picher Industries, Inc., Hillsdale Tool and Manufacturing Co. Division *and* International Union, United Automobile and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–41632 and 7–RC–21284

May 19, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 7, 1999, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed cross-exceptions and supporting briefs and answering briefs to the Respondent's exceptions, and the Respondent filed answering briefs in response to the General Counsel's and the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified[3] and to adopt the recommended Order.

The judge found, and we agree, that the Respondent did not violate the Act by issuing a warning letter to employee Ellair. As fully recounted by the judge, the Respondent conducted a series of campaign meetings in which it sought to dissuade employees from supporting the Union. Employee attendance was compulsory. Prior to the meeting in question, the Respondent's president, William Oeters, told employees he would make a speech, and employees should hold their questions until he finished. When employee Gerald Ellair nonetheless attempted to ask a question during Oeters' presentation, he was told to sit down and be quiet. When the Respondent continued its presentation, Ellair muttered "garbage" for all to hear. At that point, Oeters stated that he would issue a warning notice to Ellair.

The judge found no violation and we agree. However, the judge relied in significant part on his finding that the Respondent imposed only a "mild discipline" on Ellair. Although the relative inseverity of the discipline may be relevant to the issue of motive, we do not regard it as the determining factor in finding the discipline lawful. Rather, in the circumstances, Oeters was privileged to tell Ellair to keep quiet until Oeters was finished. Accordingly, Ellair's "garbage" comment was insubordinate and unprotected. It is this factor, rather than the relative inseverity of the discipline, which warrants dismissal of the allegation.

Beverly California Corp., 326 NLRB 232 (1998), cited by our dissenting colleague, is distinguishable. In the instant case, the Respondent said, before the meeting, that questions and comments should be withheld until after the Respondent's presentation. Ellair ignored this admonition and was insubordinate. By contrast, in *Beverly,* it is unclear whether there was a prespeech instruction. Moreover, the past practice was to the contrary, and the judge gave substantial weight to that past practice in finding that the employer's action of discipline was to punish prounion comments, rather than to maintain order at the meeting.

Similarly, and contrary to the dissent, this case does not involve "intemperate conduct during the course of engaging in protected activity." Rather, it involved insubordinate conduct during the course of an employer's lawful meeting.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eagle-Picher Industries, Inc., Hillsdale Tool and Manufacturing Co. Division, Hillsdale and Jonesville, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, concurring.

I agree with Chairman Truesdale that *Beverly California Corp.*, 326 NLRB 232 (1998), is distinguishable. However, I disagree with the standard used in that case. That case, like the instant one, involves employee conduct during the course of an employer speech. The

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings and recommendations with regard to the rule prohibiting off-duty employees from gaining access to any of the Respondent's facilities at which the employees did not work, we also rely on the *Postal Service*, 318 NLRB 466 (1995), and *Southern California Gas Co.,* 321 NLRB 551 (1996).

Member Hurtgen agrees that the Respondent maintained a work rule that unlawfully prohibited off-duty employees from gaining access to its parking lots, gates, and other outside nonworking areas. This rule facially pertains to the facility at which employees work. Member Hurtgen also agrees that the Respondent unlawfully expanded the above-work rule to prohibit off-duty employees from coming onto the Respondent's facility at which they do not work. However, in agreeing, he notes particularly that the employees at the two Respondent facilities are in one appropriate unit. He does not pass on whether the same result would obtain if off-duty employees at one facility seek to gain access to a different facility, where the two facilities are in different units. He notes that, in the cases cited above by his colleagues, the two facilities were in the same unit.

[3] In the absence of exceptions, we adopt pro forma the judge's dismissal of Objections 1, 2, 10, and 12.

We also find it unnecessary to pass on the judge's finding that Supervisor Jerome Cass interrogated employee Jeff Davis in violation of Sec. 8(a)(1) as that finding would be cumulative to the findings of other unlawful interrogations, which we adopt.

Board applied the test of *Mast Advertising & Publishing Co.,* 304 NLRB 819 (1991) (whether the employee conduct is "so flagrant and egregious as to cost [him] the Act's protection"). In my view, that test is not the one to be applied to employee conduct during an employer speech. Rather, the test was formulated to apply to employee remarks *during a grievance discussion.* In order to permit free exchange during such discussion, the Board allows some "leeway for impulsive behavior." See *NLRB v. Thor Power Tool Co.,* 351 F.2d 584, 587 (7th Cir. 1965). The test and its rationale have nothing to do with an employer speech to employees. An employer speech is not a process of collective bargaining. At such a speech, during time which the employer has paid for, the employer can insist on speaking without interruption and (if the employer wishes) can entertain employee questions and comments afterward. That is what the Respondent did in this case. The employee acted contrary to the Respondent's lawful instruction.

MEMBER LIEBMAN, dissenting in part.

Contrary to my colleagues and the judge, I find that the Respondent violated Section 8(a)(3) and (1) of the Act and engaged in objectionable conduct when it issued a warning notice to employee Gerald Ellair for his conduct during a December 1, 1998 captive audience meeting. In all other respects, I agree with my colleagues' adoption of the judge's decision.

At the December 1 captive audience meeting, Company President Bill Oeters told employees that he would not take questions during the meeting, but would answer questions on an individual basis after the meeting. Employee Jamie Buckner attempted to ask a question. Oeters told Buckner to sit down and be quiet. Ellair then stood up. Holding the employee handbook, Ellair asked why employees could not ask questions because the handbook encouraged open communication. In response, Oeters told Ellair to "sit down and be quiet or they'd write him up." Other employees who attempted to ask questions were also told to sit down. Oeters refused to answer questions and continued with his presentation.

During the presentation Oeters made comments critical of unions. In response, Ellair said, in a "moderate tone," the word, "garbage." Oeters then pointed to Ellair and stated that he wanted Ellair written up. As a result, according to the Respondent's vice president for human relations, the crowd was "chilled" and the meeting continued. After the meeting, Ellair was initially told that insubordination was punishable by discharge. He was later told he could be issued a 5-day suspension. Finally, the management officials informed Ellair that he would receive a written warning.

I agree with my colleagues and the judge that this incident must be analyzed under *NLRB v. Thor Power Tool*, 351 F.2d 584, 587 (7th Cir. 1965) ("employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect"). I do not, however, agree with my colleagues' conclusion. Ellair was warned simply for suggesting that, because the handbook encouraged open communications, employees should feel free to ask questions at the meeting, and for uttering the word "garbage" in response to the Respondent's president's negative comments about unions.

I cannot agree with my colleagues that Ellair's conduct was "so flagrant and egregious as to cost [him] the Act's protection." *Mast Advertising & Publishing Co.*, 304 NLRB 819 (1991). "[A]n employee's intemperate conduct during the course of engaging in protected activity is permitted some leeway without losing the Act's protection." *Beverly California Corp*., 326 NLRB 232, 233 fn. 5 (1998).

In *Beverly*, the Board found an 8(a)(3) and (1) violation under circumstances strikingly similar to those present here. In that case, during a captive audience meeting an employee spoke up in a loud voice and asked whether she would get a chance to ask a question. The employer's corporate director of associate relations asked her to sit down. She persisted in repeatedly asking if she could ask a question and when she could tell her side. She was then told to leave or she would be suspended. After 3–5 minutes she left the meeting. She was sent home for the remainder of that day and received an additional 3-day suspension. *Beverly California Corp*., supra. The Board found that the employee's actions were not so intemperate as to lose the protection of the Act and that the suspension for those actions violated Section 8(a)(3) and (1). The Board further found that the threat of suspension made at the meeting independently violated Section 8(a)(1).

In my view, Ellair's conduct at the captive audience meeting in the instant case was no more intemperate than that found protected in *Beverly*. Although perhaps impolite, Ellair's conduct was not significantly disruptive and, contrary to the judge's conclusion, did not jeopardize the Respondent's exercise of its rights under Section 8(c) of the Act to express its views concerning unionization. Thus, balancing the "leeway for impulsive behavior" against the Respondent's "right to maintain order and respect," I find that in this case the employee's rights outweigh those of the Respondent, and that Ellair's conduct was protected.

My colleagues seek to distinguish *Beverly.* They state that it is unclear whether *Beverly*, unlike the Respondent, issued a prespeech instruction against asking questions during the meeting, but that "the past practice was to the contrary." Thus, in the view of my colleagues, that past practice to allow questions was significant to the judge's finding that *Beverly's* action of discipline was to punish prounion comments, rather than to maintain order at the meeting. I fail to see the legal significance of the distinction my colleagues are drawing. In *Beverly,* the official

who conducted the meeting testified that he had held small meetings (groups of 10 or less employees) at which questions were permitted. However, all eligible employees attended the meeting in question, and, according to the official, questions were not to be permitted. When an employee asked whether she would get a chance to ask a question, she was told to sit down. When she persisted in asking if she could ask a question, she was told to leave or she would be suspended. (She was later disciplined.) Clearly, a no-question instruction was given; the *Beverly* official just could not *recall* whether it had also been announced at the opening of the meeting before the employee rose to ask a question. *Beverly California Corp.*, supra.

In any event, I fail to see how a prespeech (as opposed to mid-course) instruction requires a different result than in *Beverly*. Contrary to my colleagues' assertion, Ellair, like the Beverly employee, was engaged in protected activity when she attempted to speak. Surely, a prespeech instruction not to talk does not make the conduct any less protected. Nor does it immunize an employer's interference with peaceful, nondisruptive comments by employees exercising their right to express views on unionization. The relevant inquiry is whether the Act's protection is lost because the employee's conduct is so intemperate. Ellair's conduct, in my view, was not. Indeed, arguably it was even less disruptive than the repeated questions interjected by the unlawfully disciplined *Beverly* employee. Lastly, in dismissing this allegation, the judge relied in part on the "comparatively mild" nature of the discipline. I agree with my colleagues that the severity of the discipline is not determinative. What is determinative is whether the conduct is protected. If so, then any discipline—however mild—issued as a result of that conduct, would be unlawful. Because I have found, for the reasons set forth above, that Ellair's conduct was protected, I accordingly conclude that issuing Ellair a warning notice for engaging in protected conduct violated Section 8(a)(3) and (1) of the Act and constitute objectionable conduct warranting setting aside the election.

John S. Ferrer, Esq., for the General Counsel.
Peter E. Tamborski, Esq., of Cincinnati, Ohio, for the Respondent.
Betsy A. Engel, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me in Hillsdale, Michigan, on April 19–21, 1999. On April 1, 1998,[1] in Case 7–RC–21284, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union, the Petitioner, or the Charging Party) filed a petition seeking certification by the National Labor Relations Board (the Board) as the collective-bargaining representative of the production and maintenance employees of Eagle-Picher Industries, Inc., Hillsdale Tool and Manufacturing Co. Division (the Employer or the Respondent). Pursuant to a stipulated election agreement approved by the Regional Director for Region 7 of the National Labor Relations Board on November 9, an election by secret ballot was conducted on December 3 among the employees in the unit.[2] The tally of ballots reflected that of 633 valid ballots counted, 310 had been cast for representation by the Union and 323 had been cast against representation. Additionally, there were 30 challenged ballots (the challenges), which were determinative of the results of the election. The Union had challenged 27 ballots, including those of Roger Hartsell and Gary LoPresto, on the ground that the individuals who had cast them were supervisors within the meaning of Section 2(11) of the Act. The Employer had challenged two ballots on the ground that the individuals who had cast them were not employed in the bargaining unit on the date of the election. The Board agent who conducted the election had challenged one ballot on the ground that the individual who had cast it was not included in the official list of employees eligible to vote in the election.

On December 10, the Union filed objections to conduct affecting the results of the election (the objections); in the document, the Union alleged as follows (quoted verbatim):

> During the course of the Union's organizing drive, the employer and its agents:
>
> 1. Threatened loss of jobs to influence the outcome of the election.
> 2. Threatened that the plant would close in retaliation for employees' union activities.
> 3. Threatened to discipline employees for engaging in union activity.
> 4. Threatened employees with physical harm for engaging in union activity.
> 5. Threatened employees with arrest for engaging in union activity.
> 6. Enforced discriminatory and unlawful no-access, no-solicitation and distribution rules.
> 7. Interfered with employees engaged in protected solicitation and distribution.
> 8. Physically assaulted employees in retaliation for their engaging in union activity.
> 9. Created the impression of, and engaged in, surveillance of employees.
> 10. Interrogated employees in regard to their union sympathies.
> 11. Reprimanded and/or disciplined employees for engaging in union activity.
> 12. Engaged in "electioneering" at or near the polls.
> 13. Conducted "captive audience" meetings within the 24-hour period prior to the election.

On brief, the Union withdrew Objections 4 and 13.

[1] Unless otherwise indicated, all dates mentioned in this decision were in 1998.

[2] The delay between the filing of the petition and the election was partly caused by alleged unfair labor practices by the Respondent and blocking charges that were filed by the Union in Case 7–CA–40911(1) and (2). A complaint issued in that case, but the matter was resolved by an informal settlement agreement that was approved by another administrative law judge on October 21. In this case, the General Counsel has not moved to set aside that settlement agreement.

On December 17, the Union filed the charge in Case 7–CA–41632; that charge alleges that the Respondent violated Section 8(a)(1) by various acts and conduct and that the Respondent violated Section 8(a)(3) by issuing a warning notice to employee Gerald Ellair. On February 26, 1999, the Regional Director issued a complaint based on those charges (the complaint), and the Regional Director issued an order that consolidated the complaint and representation cases and set the entire matter down for hearing before an administrative law judge. The Respondent filed an answer to the complaint denying the commission of any unfair labor practices; the Respondent further denied additional complaint allegations that LoPresto and Hartsell were at relevant times supervisors within Section 2(11) of the Act or agents within Section 2(13).

At the hearing, the Union withdrew its challenges to 25 of the 27 ballots of alleged supervisors, the exceptions being those of LoPresto and Hartsell. The Employer also withdrew its two challenges, and the parties stipulated that the Board agent's challenge to one ballot should be sustained. After I conducted a count of the resolved challenges, the tally of ballots was amended to reveal that 312 ballots had been cast for union representation and 348 had been cast against representation. (The challenges to the ballots of LoPresto and Hartsell were thereby rendered nondeterminative, but the status of each is an issue in the complaint case, as discussed infra.) Because the Union did not receive a majority of the valid votes that were cast in the December 3 Board election, rulings on the objections, as well as the alleged unfair labor practices, are required here.

On the testimony and exhibits entered at trial,[3] and on my observations of the demeanor of the witnesses,[4] and after consideration of the briefs that have been filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

As it admits, the Respondent is a corporation that is located in Hillsdale and Jonesville, Michigan, where it manufactures parts for the automobile industry. During 1998, in the conduct of said business operations, the Respondent sold, shipped, and delivered directly to customers located at points outside Michigan goods valued in excess of $50,000. Therefore, at all relevant times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent employs about 700 employees who work in its 2 plants in the Hillsdale area. The main plant is on Industrial Drive in Hillsdale; it is comprised of several buildings, which are collectively referred to as the Industrial Drive facility. An auxiliary plant is located about 2 miles away, and it is referred to as the Jonesville facility. Both plants are three-shift operations; the first shift is operated from 6:50 a.m. until 2:50 p.m.; the second shift is from 2:50 to 10:50 p.m., and the third shift is from 10:50 p.m. until 6:50 a.m., the next day.

[3] Certain errors in the transcript have been note and corrected.

[4] Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

Paragraph 7 of the Complaint and Objections 1 and 2

Wayne Swander is not an employee of the Respondent, but he is the brother of Quality Manager Donald Swander, and he is a friend of current employee David Johnson. Johnson testified that in August he and Wayne Swander were eating a meal in a restaurant in Hillsdale when they were joined by Donald Swander and Donald's son (who was not named during the trial). A conversation began about a car wash that Johnson was then managing (as a second job, apparently). According to Johnson, during the conversation Donald Swander (Swander) asked Johnson how he could be a manager for one company but be a prounion employee while working for the Respondent. Johnson testified that after he gave his reply to Swander: "Don just said if the Union comes in the plant will close." Swander testified on behalf of the Respondent that:

> But we got into just conversation about the Union and I think at that time, I expressed my opinion [by] bringing out a hypothetical situation and [I asked] what would prevent the Company from moving its facilities if they chose not to deal with a union or cooperate with a union.

Neither Wayne Swander nor his son testified. To the extent that they differ, I credit Johnson over Swander. As the General Counsel contends, however, by either account Swander threatened Johnson with plant closure. Swander's rhetorical question was as much a threat of plant closure as a direct statement. I find and conclude that by Swander's threat of plant closure the Respondent violated Section 8(a)(1).[5] Johnson, however, did not testify that he told any other employees about Swander's threat, and the Respondent contends that, even if Swander's remark to Johnson violated Section 8(a)(1), it is not a valid basis for setting aside the December 3 Board election because the threat was not disseminated. I agree. At the close of the hearing,[6] I specifically asked the parties to brief me on the issue of whether dissemination of threats such as Swander's was required by Board precedent before an election is to be set aside, but the Charging Party does not discuss the issue of dissemination on brief. The Respondent, however, cites, inter alia, *Antioch Rocky & Ready Mix*, 327 NLRB 1091 (1999), in which the Board, after a review of relevant authorities, plainly states:

> And the objecting party must establish dissemination of statements allegedly interfering with preelection conditions; dissemination will not be presumed. *Kokomo Tube Co.*, 280 NLRB 357, 358 including fn. 9 (1986). The Employer here has not established that this election must be set aside.

In *Antioch Rock & Ready Mix*, the undisseminated coercive statement was uttered by a union representative; here, the undisseminated coercive statement was uttered by a manager. The result, of course, is the same. I shall therefore recommend that the Board overrule Objections 1 and 2 to the extent that they refer to Swander's conduct.

Paragraphs 8(a)(b) and 9 of the Complaint and Objections 5, 6, and 7

For several years the Respondent's employee handbook has maintained rules stating:

> Unless you have been called in early or required to stay late by your supervisor, you should not arrive on the

[5] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

[6] Tr. 461.

premises more than fifteen (15) minutes before your starting time, and you should leave the premises within fifteen minutes (15) after your scheduled quitting time.

Unless you have permission from your supervisor, your should not return to the plant during your nonworking hours.

Also for several years the following no-solicitation and no-distribution rules have been contained in the handbook:

Solicitation and Personal Business

All types of solicitation, including solicitation of membership or subscriptions, will not be permitted by employees who are supposed to be working or in such a way as to interfere with other employees who are supposed to be working. Any employee who does so and thereby neglects his work or interferes with the work of others will be subject to disciplinary actions.

Distributions of any kind, including circulars or other printed materials, will not be permitted in any work area at any time or by employees who are supposed to be working.

People who are not employees of Eagle-Picher Automotive Hillsdale Tool Division will not be permitted to solicit or distribute literature or goods at any time on Company property.

On November 30, Sam Trego, the Respondent's vice president of human resources, posted a memorandum to all employees that stated:

SUBJECT: Campaign Conduct

We have received numerous complaints of employees being intimidated [and] harassed and damage to personal property on Company property.

Employees are permitted to solicit and distribute information during nonwork time and in nonworking areas.

Solicitation[s] and distribution[s] [are] not permitted by non-employees on our property. In addition, Hillsdale Tool employees are not permitted on the property of Hillsdale Tool facilities other than their own without prior authorization.

As provided in the handbook, employees are permitted on the property of the plant where they work fifteen minutes prior to the start of their shift and up to fifteen minutes after the end of their shift.

Those not complying will be asked to leave the property. Those ignoring such request[s] will be trespassing and will [be] addressed as a matter of law.

Your cooperation is appreciated.

The complaint alleges that both the above-quoted handbook and Trego's November 30 posting contain overly broad, and unlawful, no-solicitation and no-access rules and that the Respondent promulgated and maintained those rules in violation of Section 8(a)(1). Specifically, paragraph 8(a) alleges that Trego's November 30 posting contained an unlawful no-solicitation rule because it prohibited employee solicitations in work areas during nonworking times; paragraph 8(b) alleges that: (1) Trego's November 30 posting also contained an unlawful no-access rule because it prohibited employees from going for purposes of engaging in protected solicitations or distributions to any of the Respondent's facilities at which they did not work; and (2) both Trego's November 30 posting and the employee handbook contain an unlawful no-access rule prohibiting off-duty employees from coming to the outside nonwork areas of the Respondent's facilities for the purposes of solicitations or distributions. Paragraph 9 of the complaint alleges that the Respondent threatened employees with arrest if they violated its unlawful no-access rule.

In regard to paragraph 8(a), it is first to be noted that it does not attack the *no-distribution* rule that is contained in Trego's November 30 memorandum; it attacks as invalid only the *no-solicitation* rule that is contained in that memorandum. With certain nonapplicable exceptions for the retail sales and health care industries, the law is that employees have the statutory right to engage in *solicitations* for a union in both work areas and nonwork areas during their nonworking time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Nondiscriminatory rules may prohibit employees from engaging in *distributions* in working areas during their working *and* nonworking time, but employees cannot lawfully be prohibited from *solicitations,* even in working areas, if they are on nonworking time (for example, when they are on a permitted break, paid or unpaid, in a working area). That is, the law affords employees more latitude for solicitations that it does for distributions; again, the former may not be limited to nonworking areas when the employees are on nonworking time, but the latter can be. Trego's memorandum, however, equally restricts employee solicitations and distributions by stating, "Employees are permitted to solicit *and* distribute information during nonwork time *and* in nonworking areas." Using one sentence to announce two different categories of prohibitions (those against solicitations and those against distributions), the memorandum thereby affords employees no more latitude for solicitations that it does for distributions; both are restricted to nonworking time *and* nonwork areas.

Using an affirmative proposition to announce a prohibition, Trego's November 30 memorandum states that employees *are* permitted to engage in solicitations if they do so in nonworking times "and" in nonworking areas. The obvious converse of that proposition is that employees who are in working areas during nonworking times *are not* allowed to engage in solicitations, a plain violation of such employees' rights under Section 7 of the Act as stated in *Stoddard-Quirk,* supra.

On brief, the Respondent does not contest that the November 30 no-solicitation rule is violative, and objectionable, on its face. The most that the Respondent argues is that employees could determine the Respondent's true intent by reading its year old employee handbook, which contains a valid no-solicitation rule. The handbook no-solicitation rule is unquestionably valid, but even if an employee attempted such analysis he would necessarily assume that the later published rule is the one that would be enforced. At best, the employee would be confused by the inconsistencies that such an analysis would reveal. Inconsistencies that create such confusion are, of course, to be resolved against the party who created them, the Respondent. See *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983).

I find and conclude that the Respondent's November 30 no-solicitation rule would have tended to thwart lawful exercises of employee rights under the Act, and the Respondent's promulgation and maintenance of that rule violated Section 8(a)(1), as alleged in paragraph 8(a) of the complaint. The promulgation and maintenance of the invalid no-solicitation rule would, moreover, tend to interfere with the employees' rights to en-

gage in protected solicitations regarding the December 3 Board election, and I shall therefore recommend that Objection 7 be sustained in this regard.

In regard to the allegations of paragraph 8(b) of the complaint that the Respondent has promulgated and maintained overly broad no-access rules, the controlling authority is *Tri-County Medical Center*, 222 NLRB 1089 (1976). In that case, the Board rejected the notion that off-duty employees have no more right to enter the exterior of their employers' premises than nonemployees such as professional union organizers. The Board held: "Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside nonworking areas will be found invalid." The no-access rule that is contained in the Respondent's handbook bars employees from being in its outside nonworking areas more than 15 minutes before and after shifts. The Respondent does not contest that the handbook no-access rules are facially invalid prohibitions against off-duty employees' gaining access to its outside nonworking areas under *Tri-County*. Nevertheless, the Respondent relies on certain testimony by Trego that maintenance of the rules was necessitated by historic acts of vandalism and employee complaints of harassment. That bare testimony was completely uncorroborated, and it contained no hint of how the barring of current, but off-duty, employees may have solved any of the alleged problems. In fact, Trego's testimony is not only incredible, it invites the immediate inference that what Trego called complaints of harassment were nothing more than the (problematical) complaints that were made by antiunion employees about protected activities of prounion employees.

It is true that in *Tri-County Medical Center*, and in *Nashville Plastic Products*, 313 NLRB 462 (1993), as cited by the Respondent, the Board noted that the no-access rules before it were promulgated in response to employees' union activities, and the promulgations were therefore held to be unlawful. In neither case, however, did the Board indicate that an otherwise invalid no-access rule would be held to be valid if it is imposed on employees before an organizational attempt begins. Moreover, in *St. Luke's Hospital*, 300 NLRB 836 (1990), the Board found a violation in the employer's maintenance of an invalid no-access rule that was promulgated 6 years before the organizational attempt began. I therefore find and conclude that, since on or about June 17,[7] in violation of Section 8(a)(1), the Respondent has maintained in effect rules that prohibit off-duty employees from gaining access to its parking lots, gates, and other outside nonworking areas for the purposes of engaging in lawful solicitations and distributions. Finally, the November 30 no-access rules, as well as repeating the violative handbook no-access rule, for the first time prohibited employees from going without management's prior permission to any of the Respondent's facilities at which the employees did not work. Such a rule also flies in the face of *Tri-County Medical Center*, and its promulgation and subsequent maintenance did violate Section 8(a)(1), as I further find and conclude. Respondent's conduct in maintaining its violative handbook no-access rules, and its conduct in promulgating and thereafter maintaining in effect its November 30 no-access rules, further prove the validity of Objections 6 and 7 which I shall recommend that the Board sustain.

In reply to the allegation of paragraph 9 that the Respondent threatened employees with "arrest" if they did not comply with its unlawful no-access rules, the Respondent answers simply that the word "arrest" or "arrested" is not mentioned in the November 30 posting. The posting, however, plainly stated that the Respondent would consider off-duty employees to be trespassers if they are present at the Respondent's premises more than 15 minutes before or after their shifts or if they come to a facility other than the one at which they regularly work. The posting then threatened the employees with being "addressed as a matter of law." When one engages in a trespass, he may be "addressed" under color of law without being arrested, but he also could well be arrested. The Respondent did not make its meaning clear in its November 30 posting, and the ambiguity that the Respondent created must be resolved against it.[8] I therefore find and conclude that by threatening employees with arrest if they violated its unlawful no-access rules the Respondent violated Section 8(a)(1). Moreover, the evidence adduced in support of this allegation proves the validity of Objection 5, and I shall further recommend that the December 3 election be set aside on that basis.

Paragraph 10(a)(b) of the Complaint and Objections 1, 2, and 10

Current employee Jeffrey Davis testified that in early October he came to work wearing a "Union-Yes" pin. When he arrived, Davis found Third-Shift Supervisor Shawn McCavit sitting on a forklift. Both Davis and McCavit had recently been working a great deal of overtime, and Davis initiated a conversation about that topic. During the exchange, according to Davis:

> [McCavit] asked me what did I need that for, and he pointed to my pin.
>
> I responded that I wanted better medical benefits, that was one of the key issues I had, fair treatment of employees, and I wanted a contract, something that I could deal with. . . . I asked, "Why don't you want a union?"
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> And his response to that was: "I don't want to have to sell my house."
>
> And then I asked him, "Why would you have to sell your house?
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> He goes, "If I lose my job, I'd have to sell my house."
>
> And I said, "Well, why would you lose your job?"
>
> And he goes, "Well, you know, things can happen."
>
> And I said, "Are you trying to imply that the plant would close if we had the Union come in?"
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> And he said, "It's a distinct possibility."
>
> And he was [still] on a fork truck at the time and started to drive away and he looked at me and said: "Think about it."

McCavit did not testify; Davis' testimony on the point was credible; and I do credit that testimony.

The complaint alleges that by McCavit's conduct the Respondent violated Section 8(a)(1) by interrogating employees and threatening them with plant closure. Of course, McCavit's threat to Davis that plant closure was a "distinct possibility" if

[7] This is the Sec. 10(b) date; although the handbook's facially invalid no-access rule was promulgated before that date and no violation can be found on that account, maintenance during the Sec. 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1). See *Varo, Inc.*, 172 NLRB 2062 (1968), and *K & S Circuits, Inc.*, 255 NLRB 1270 (1981).

[8] See *J. C. Penney*, supra.

the employees selected the Union as their collective-bargaining representative was a blatant threat in violation of Section 8(a)(1), as I find and conclude. The Respondent does not argue that point on brief, but it does state that McCavit's asking Davis why he needed a union pin, "was part of a casual discussion initiated by Davis when he asked McCavit a question regarding overtime." From that proposition, the Respondent argues that the interrogation of Davis by McCavit could not have been violative of the Act. The conversation about overtime may have been casual, but the mention of Davis' prounion pin was not. It was brought out of "left field," by the supervisor and it would necessarily have conveyed to the employee the impression that, no matter what else may be of importance (such as the burdens or rewards of overtime), the pin was what the supervisor was primarily interested in. Specifically, the supervisor wanted to know why the employee was wearing prounion insignia. Such an interrogation is especially coercive where, as here, it is coupled with an unabashed threat that the organizational attempt could result in plant closure. The interrogation, as well as the threat with which it was coupled, therefore violated Section 8(a)(1), as I find and conclude. The Charging Party, however, offered no evidence that the fact of McCavit's threat to, or interrogation, of Davis was disseminated in any way to other employees. For that reason, and on the authority of *Antioch Rock & Ready Mix*, supra, and cases cited there, I shall recommend that Objections 1, 2, and 10 be overruled to the extent that they are premised on McCavit's conduct in this regard.

Paragraph 10(c) of the Complaint and Objection 6

Shawn Hodas, who did not testify, is a machine operator who occasionally serves as a leadman. Employee Davis testified that in late November, he arrived at 10:20 p.m., or 30 minutes before his shift began at 10:50 p.m., to distribute prounion fliers at an entrance of the Industrial Drive facility where he regularly worked.

At "close to 10:30," according to Davis, when McCavit was in an area that was inside the entranceway:

> Shawn Hodas was coming through the doors when I offered him one of the pamphlets that I was passing out at that time and, as he walked past me, he said "No, thank you."
>
> And I said, "Nobody's going to bite you for taking it," and he continued to walk.
>
> And Shawn McCavit came up there and started . . . yelling at Shawn [Hodas . . . that he [McCavit] was tired of seeing us "f—king people" around and that he [McCavit] "can't do anything about me being there," and, if Shawn [Hodas] had had the "balls," he'd kick me out.
>
> Shawn Hodas . . . walked off, and I continued passing out leaflets until it was time to resume [go to] work.

Several employees testified, and the Respondent does not dispute, that before the organizational attempt began they were allowed to come to work more than 15 minutes early without any type of admonition by management representatives. Based on that testimony, as well as the testimony of Davis that is quoted immediately above, the complaint alleges that by McCavit's conduct the Respondent "disparately enforced its overly broad no-access and no-solicitation and distribution rules by attempting to prohibit employees from distributing union literature outside its facility." Again, McCavit did not testify, and I found the testimony of Davis to be credible.

On brief, the Respondent argues only that the incident was just one of many incidents of "vigorous" campaigning and that Davis's pre-work distribution was not actually interfered with. As noted, the Respondent did not enforce its no-distribution rules or its no-access rules before the organizational attempt. Moreover, the General Counsel is not required to prove the effectiveness of interference with protected activities in order to establish a violation. For example, in *Pizza Crust of Pennsylvania*, 286 NLRB 480 (1987), the Board found that the employer's exclusion of off-duty employees violated the rule of *Tri-County Medical Center* and violated Section 8(a)(1). On review, the employer challenged the Board's finding of actual interference. In enforcing the Board's Order, the Third Circuit, at 862 F.2d 49, 54–55 (1988), rejected that argument stating:

> The Company argues that because the pamphleteers were not intimidated and in fact distributed the literature that they intended to distribute on December 14 and 18, there was no section 8(a)(1) violation. Nothing in the *Tri-County* rule implies that the Act is violated only if the employer was successful in its barring of solicitation. We are not at liberty to increase the difficulty borne by the General Counsel of making out unfair labor practice charges by requiring him or her to bear the additional burden of proving the consequences of illegal conduct. Instead, the relevant issue is whether the employer established a policy or rule that was directly contrary to *Tri-County*. If so, such evidence would support the Board's finding of an unfair labor practice. See *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 622 (7th Cir.1981) (upholding the Board's finding that such rules violated section 8(a)(1)); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir.1976) (same).

McCavit's (vile-language) suggestion to Hodas that Davis should be ejected from the premises because of his protected union activities was therefore an enforcement of the Respondent's violative no-access rules. As employees had previously been allowed to come early to the property, it was further discriminatory, and unlawful, conduct on the part of the Respondent. McCavit's action toward Davis therefore violated Section 8(a)(1), as alleged. I further find and conclude that the evidence in support of this allegation also supports Objection 6, and on that basis I shall further recommend that the December 3 election be set aside.[9]

The complaint further alleges that McCavit's interference with Davis' solicitation of Hodas was an invocation of the Respondent's November 30 no-solicitation rule that I have above found to be overly broad. Davis testified that the incident with McCavit occurred in "late November," but he did not testify that it occurred during the hours of November 30 that followed the posting of Trego's November 30 memorandum that contained the invalid no-solicitation rule. In this posture of the case, I cannot find that McCavit's action toward Davis was an enforcement of the Respondent's November 30 invalid no-solicitation rule, and I shall recommend that that allegation be dismissed. The complaint further alleges that McCavit's action

[9] It is to be noted that in *Pizza Crust of Pennsylvania*, two *Tri-County* violations, alone, were held to be a sufficient basis for setting aside a Board election.

toward Davis was an enforcement of some overly broad no-distribution rule, but the complaint at no other point identifies what no-distribution rule that might be. The complaint does not allege that either the November 30 posting or the preexisting employee handbook contained an overly broad no-distribution rule. Therefore, the allegation that McCavit's action was an enforcement of an unlawful no-distribution rule must be dismissed. (Also to be noted is that employees were previously allowed to solicit and distribute literature without restriction before the organizational activity began, but the complaint does not allege that McCavit's interference with Davis' solicitations and distributions was a discriminatory enforcement of the *valid* no-solicitation and no-distribution rules that preexisted in the Respondent's employee handbook.)

Paragraph 10(d) of the Complaint[10]

Gary Klein is an organizer for the Union, and he was in charge of the organizational effort involved here. Klein caused certain literature to be printed for distribution to employees by himself and other nonemployee organizers as well as by prounion employees. Klein freely admitted that he and the other nonemployee organizers "repeatedly" entered the gates of the Respondent's Hillsdale and Jonesville plants to distribute literature to employees on the Respondent's property, and that they did not leave until they were approached by supervisors and told to go outside the gates.[11] Klein testified that about 6 a.m. on November 24, he, organizer Rick Ringman and a group of employees who included David Johnson and Ron and Steve Ryan went through a gate of the Industrial Drive facility and distributed fliers at a point just a few feet from an employee entrance. The group handed union literature to employees who were leaving the third shift and coming to work on the first shift. About 6:30 a.m., the group was approached by McCavit. Klein and Johnson testified about what happened next. Klein's testimony contained bald exaggerations that were exposed by Johnson's testimony, and I shall rely only on the testimony of Johnson. Johnson testified that:

> Shawn McCavit came out of the plant while we were all standing, handing out literature, and he said, "What are you doing?" We said we were handing out literature. And he looked around and he said, "Well I know you guys [referring to the employees present], and then he looked at Gary Klein and Rick Ringman and said, "I don't know you guys; who are you?"
>
> And then Gary responded, "Well who are you?"
>
> And he [McCavit] said, "Well, I am a third shift supervisor."
>
> So then he [McCavit] said, "Well you guys [the Union representatives] are going to have to leave. I know you guys [referring to the employees who were present]."...
>
> So I turned to hand out a leaflet to an employee coming in and Shawn reached over, and he said "What is that?" And he took it out of my hand and stood there and read it. Then, when he got through reading it he looked at Klein and Ringman to see if they were leaving, and they were leaving, and by that time, he did[12] give the flier back to me.
>
> By that time it was time to go in because we start at ten minutes to seven, so we went on in.

During his cross-examination, Johnson acknowledged that McCavit did not ask him (or, presumably, the other employees who were present with Klein and Ringman) to leave the premises.

The complaint alleges that by McCavit's November 24 conduct the Respondent "interfered with the employees' distribution of literature on behalf and in support of the Charging Union" in violation of Section 8(a)(1). The complaint does not say how McCavit allegedly interfered with the employees' distributions. On brief, the General Counsel does not withdraw this allegation because of Johnson's acknowledgment that McCavit did not tell the employees that they should stop their distributions and leave. Instead, the General Counsel ignores the testimony of his witness Johnson and quotes only Klein's incredible testimony to argue that during the incident McCavit interfered with the employees' distributions by interrogating and assaulting Johnson. Asking a group that included nonemployees, such as Klein and Ringman, what they were doing on the Respondent's property hardly constitutes coercive conduct. Moreover, the effect of Johnson's testimony is that McCavit touched him only incidentally as he reached for the flier, which McCavit almost immediately returned. There was, therefore, no coercive conduct in the November 24 incident by the Respondent, and I shall recommend dismissal of paragraph 10(b) of the complaint.

Paragraph 11 of the Complaint and Objections 6 and 7

Paragraph 11 alleges that in two separate incidents, one on November 10 and the other on November 11, admitted supervisor Jim Cole: "promulgated and disparately enforced an overly broad policy prohibiting employees from talking during work time in working areas and during nonwork time in nonwork areas, respectively."

November 10 Incident Involving Cole

Employee Jerry Hukill is a tool-crib attendant whose job entails walking about the Jonesville facility delivering tools and supplies to employees who are stationed on various production lines. Hukill testified that on November 10, he passed by employee Johnson's workplace; he stopped and:

> [W]e was talking, had been talking about a mutual friend of ours that had been in the hospital and they were debating whether they was going to cut him off life support. I asked him if he had heard anything about the pension, any update on it, and he said no. At that point [admitted supervisor] Jim Cole come up and he told us that we didn't need to be talking about the Union.
>
> And I said, "We are not talking about the Union; we are discussing the pension."
>
> And he [Cole] said that I didn't need to know anything about the pension until I was ready to retire.
>
> And I informed him that it was too late then.

Hukill testified that his exchange with Johnson lasted "a minute or two." Hukill acknowledged that both he and Johnson were on working time during their exchange that Cole interrupted;

[10] On brief, the Charging Party does not contend that any of the objections are supported by the evidence that the General Counsel introduced in support of this paragraph of the complaint.

[11] The Tr. 40, immediately after L. 17, is corrected to indicate an answer of "Yes."

[12] The Tr. 203, l. 5, is corrected to change "didn't" to "did."

Hukill testified that, although he had stopped to engage in the exchange, Johnson continued working.

Johnson corroborated Hukill's testimony about what Cole said to him and Hukill. Both Johnson and Hukill testified that they had not, in fact, been talking about the Union when Cole interrupted them. Both Johnson and Hukill also testified that, theretofore, employees were allowed to engage in personal conversations as they were working, and that testimony was not disputed. Johnson, however, flatly denied that either he or Hukill stopped working during their exchange; Johnson insisted that the exchange occurred only as Hukill was "walking by," and he also insisted that their conversation could not have taken more than 30 seconds. Further, Johnson did not testify that their exchange involved a mutual friend who was being taken off life-support; Johnson testified that the exchange was centered around Hukill's mother-in-law who had recently suffered a stroke.

Cole testified that he found that Hukill had stopped his toolcart at Johnson's work station, and was talking to Johnson, when he spoke to Hukill, only. According to Cole:

> I said, "Jerry, you have to leave so Dave can go back to work."
>
> Then Dave says, "Well, I can talk to him all I want because we're talking shop business.
>
> And I said, "No, you can't."
>
> Then Jerry said, "Okay," [and] took his cart and left and Dave went back to work.

Cole flatly denied that he made any mention of the Union when he addressed Hukill and Johnson.

Having a friend who is being taken off life-support is a dramatic situation; so is having one's mother-in-law suffer a stroke. One is not likely to confuse the two dramatic situations, or conversations about them. Also, Johnson and Hukill disagreed on whether Hukill had stopped working to engage in their exchange, Johnson testifying that Hukill did not and Hukill testifying that he did. (Again, Johnson insisted that the exchange happened only as Hukill was "passing by," but Hukill acknowledged that he stopped for "a minute or two.") Contrasted with these conflicts was Cole's testimony, which I found forthright and credible. I shall therefore recommend dismissal of paragraph 11 to the extent that it relies on the testimony of Hukill and Johnson about the November 10 incident. I shall further recommend dismissal of Objections 6 and 7 to the extent that they are premised on the same discredited testimony.

November 11 Incident Involving Cole

The second allegation that is based on Cole's alleged conduct relies on the testimonies of Johnson and current employee Orville Close who is also a machine operator. Close testified that employees are permitted a 20-minute break during the day which they take at no specified time. On November 11, when he had time to take his break, Close went to the lunchroom and got a roll and coffee. Then Close returned to take his break in the work area, something that he had done many times in the past. Close decided to visit Johnson and, as he was walking toward Johnson's machine, he was joined by janitor Larry Sharrar. When Close and Sharrar reached Johnson's machine, Johnson was working, according to Close. At the same time, Cole was operating another machine about 30 feet away from Johnson's machine. Close testified that he and Sharrar talked to Johnson for something less than a minute when:

> He [Cole] hollered over from where he was at and told us that we were not entitled to talk with Dave, that we were suppose to be running our jobs.
>
> I hollered over at him and told him that I was on my legitimate break, and he said that does not matter, you are not suppose to talk with him, you take your break somewhere else in this building.
>
> [W]e just split up and went on our way.

Sharrar did not testify. Johnson testified (three times) that he was on break when Close and Sharrar approached him at his machine. Johnson further testified that: "Jim Cole said, 'You can't be over here talking; don't talk Union,' and we said that we were on break so we just left." Cole generally denied telling any employee to stop talking about the Union, but he was not asked about the event described (differently) by Close and Johnson. On brief, the General Counsel acknowledges the conflicts between Close and Johnson, but he offers no suggestion of how those conflicts can be reconciled.

Close was an actively prounion employee, and if Cole had said that the employees were not to talk about the Union Close would assuredly have included the fact in his testimony. Close also had no reason to lie and say that Johnson was still on working time during the event. Because of these conflicts, and because of the overall credible demeanor that Cole displayed, I credit Cole's denial, albeit general, that he ever told any employee not to talk about the Union. I shall therefore recommend dismissal of paragraph 11 as it refers to this incident. I shall further recommend that the Board overrule Objections 6 and 7 to the extent that they are premised on this incident.

Paragraph 12 of the Complaint[13]

Employee Joseph Thompson is a machine operator who works at the Jonesville facility on the second shift. At a table beside his machine he regularly maintained prounion literature that other employees could pick up as they passed. Thompson testified that there were at the Jonesville facility four bulletin boards where employees were allowed to post literature such as announcements of private sales, deer-hunting information and prounion literature. One of those bulletin boards was located within 10 feet of the machine that Thompson regularly operated; that bulletin board's size was about 3 feet by 4 feet. On about half of that bulletin board (and on half of the other bulletin boards) management also regularly posted notices, including anti-union literature.

Thompson testified that on November 24, just before his shift started, he posted union literature on the bulletin board near his work area. As he did so, he noticed that some literature that he had previously posted had been removed; at the time, he did not know who had removed that literature. Thompson testified that he re-posted other copies of what he had previously posted, and he added some new postings. According to Thompson this made a total of "about 12" prounion postings on the bulletin board. At the time, further according to Thompson, there were "two or three" management postings on the bulletin board. All of the prounion and management postings were on letter-size paper. At his first break (about 2 hours

[13] On brief, the Charging Party does not contend that any of the objections are supported by the evidence that the General Counsel introduced in support of this paragraph of the complaint.

after shift-start), Thompson checked the bulletin board and saw that: "there were only like three or four [of his prounion postings] left out of twelve." As Thompson was noticing this, admitted supervisor Brian Cleveland walked by. According to Thompson:

> I asked him where my postings went, and he said, "I took them down. . . . [Y]ou already have some up there; you can't repeat yourself."
>
> He said, "Don't re-post them, please."

Thompson acknowledged that Cleveland returned to his bench the union fliers that Cleveland had removed from the bulletin board. When asked on direct examination if some of his postings had been duplicates, Thompson replied that the postings were two-sided and: "The backs were the same, I mean there may have been some duplicates up there. But I believe they all said about the same things, but they were different." Thompson further testified that as Cleveland was talking to him, Cleveland posted additional management campaign fliers and then the number of management fliers came to "Maybe ten, because he put some of his up and he moved mine down."

Thompson further testified that at his lunchtime (about 2 hours later) he went back to the bulletin board and re-posted the material that Cleveland had removed. Then Cleveland, "came up to me and he said, 'Don't do that again, please.'" Thompson testified: "I just nodded my head like this and smiled at him and walked back to my machine." When asked if he covered Cleveland's promanagement postings with his prounion postings, Thompson replied: "Not totally covered, no. They may have overlapped a little bit, but it is not like I just posted it right over the top of his. . . . Sometimes we were short on pins and we used the same pins, and I don't know, they may have overlapped by four inches. They weren't totally pinned down corner to corner." When asked on cross-examination if he had not posted some of his prounion fliers with duplicate sides showing, Thompson replied: "There may have been, I don't recall."

Based on Thompson's testimony, the complaint alleges that the Respondent, by Cleveland: "(a) removed union literature from a bulletin board shared by Respondent and employees; [and] (b) prohibited employees from posting union literature on a bulletin board shared by Respondent and employees."

Cleveland testified that when he first went to the bulletin board that is near Thompson's work station:

> And there was two pieces of literature there for us. And I went up there to that board and I was going to put up our information, our message, and I noticed that there was really not much room because there was lots of papers up there. Many duplicates. So I removed the duplicates and made sure that there was literature representing the Union, one, of everything they needed or wanted to say. I put those back up and then I put ours down on the bottom.
>
> And when I was doing that, Joe asked me what I was doing and I told him. I said, "We got a message to get out and I want to present it to everybody, so I'm going to remove the duplicates."
>
> Joe said that I shouldn't remove those. And I told him that I was just removing the duplicates.
>
> So what I removed were the duplicates and I put them in his pile, near his work area. And then made sure they had . . . one of everything they had up there and then one of everything we had.
>
> [I said to Thompson]: "There you go. We're even, you know. Everybody's got their message being given."

Cleveland testified that he then left Thompson's work area and:

> I come back probably a half hour later or so, and it looked like the board exploded. There was papers all over it. Mostly [saying] "Vote 'Yes' on December 3rd," which was the back statement on most of the UAW papers.
>
> There was no rhyme or reason to it. So I again, removed those, made sure there was representation up there, one, of all the statements that were needed to be made that they had that day. And one of ours. . . .
>
> And I asked Joe not to mess with it, "Please." Because they got a message to get out; we got a message to give out. And this is a board for everybody.

Still later, according to Cleveland:

> I came back after break . . . [a]nd now, it's different. Now, it's [alternating] UAW . . . company, UAW, company, UAW, company. And there on these bright fluorescent-colored papers that you could not understand the message to be given there. You could not distinguish between the two. It was one here, one here, one here.
>
> And I asked Joe, "What are you doing? Why is it this way? I thought I had asked you to please leave them alone."
>
> He said he liked it that way. It looked good. It looked nice.
>
> And I asked him if he would remove it, "Please."

Cleveland testified that he later returned to the bulletin board and saw that it was still in disorganized fashion. He rearranged the prounion and proemployer campaign literature so that each side's literature had about half of the bulletin board space. Cleveland denied that he removed any of the prounion literature except for duplicates.

To the extent that their testimonies differ, I credit Cleveland over Thompson. Cleveland did no more than remove duplicates of postings on the bulletin board that was in Thompson's work area,[14] he divided that bulletin board between the two competing factions, and he told Thompson not to disturb that division. Before and after this conduct, the Respondent allowed Thompson to freely distribute material in the same area by leaving it out on his work bench for other employees to pick up as they passed, as well as to post union literature on the bulletin board. Also the employees took full advantage of their right to distribute union literature in the lunchroom and they used the other Jonesville facility bulletin boards for the same purpose. In these circumstances the Respondent's conduct cannot be held to be coercive, and I shall therefore recommend that paragraph 12 of the complaint be dismissed.

Paragraph 13 of the Complaint and Objection 8

Employee Mike Null testified that in mid-November, near the end of his shift, Plant Manager Dennis Minor and Human Resources Department Manager Mary Wall conducted an employer campaign meeting in the Respondent's training room. An anti-union motion picture presentation was made. In the audience were 20 to 30 employees. About two-thirds of the

[14] As revealed by the hesitancy and evasiveness in Thompson's quoted testimony, there is no real question that he had posted duplicates.

way through the presentation, the film's narrator said, "If you don't have a union, you can deal with management." To that Null responded (in what he called a "normal" tone): "I've dealt with them before." The presentation finished without further incident. The employees who had been in attendance filed out of the training room into a main aisle where then present were several other employees were then reporting to work. According to Null, as he walked among the other employees, Minor approached him from behind, "grabbed" his right arm just above the elbow, "pulled" him about 5 feet to the side of the aisle, and "told me that, when I was in that meeting I was on his time and that I would pay attention and we wouldn't be having this talk again, would we?" Null testified that he replied, "No, sir; we won't." Null then resumed walking with other employees toward the work area. Employee Davis testified that he attended the presentation with Null; he testified consistently with Null about what happened during and after the presentation. Davis testified that he could not hear the words that Minor used when speaking to Null, but he could tell that Minor was "angry." Based on this testimony by Null and Davis, the complaint alleges that the Respondent, by Minor: "physically assaulted an employee for his engaging in activity on behalf and in support of the Charging Union."

Minor testified that before the film presentation he read a statement to the gathered employees. During his reading: "Mike was very disruptive. He started moving his body about, kicking the chairs in front of his seat. Hitting his head against the wall." Minor did not stop his reading to admonish Null, but after the presentation, when he and the employees had left the room and gone into the aisle:

> In passing, I went out and I tried to get his attention. I couldn't get his attention when I called his name, so I walked up behind him, took him by the arm and . . . I reminded him that I was paying him to sit there. And I know that Mike's sympathies were with the union. I mean, he makes that well known. And I told him, "I understand that. But, you know, please, as long as I'm paying you, don't disrupt the meeting."
>
> And he was polite about it, and said, "Okay."

Minor denied pulling Null to the side of the aisle. During his testimony, Minor did not mention Null's conduct during the film presentation; specifically, he did not mention Nulls remark of: "I've dealt with them before." On cross-examination, Minor acknowledged that the incident occurred at a shift-change, "[s]o there were plenty of employees in the area." Both Null and Davis denied that during the meeting Null banged his head against a wall or engaged in any other such disruptive conduct.

The Respondent did not call Wall to testify that Null banged his head against a wall or engaged in other such disruptive conduct. Wall is a manager, and presumably if her testimony would have been favorable to it the Respondent would have called her to testify.[15] Also, if Null had engaged in such disruptive conduct, Minor presumably would have stopped his reading and told Null to quit it. I credit Null and Davis and find that Null did not engage in such disruptive conduct. I further credit Null and Davis and find that Minor pulled Null about 5 feet from the center of the aisle to the side of the aisle in order to confront Null.

Null's (once) speaking up to challenge the film presentation's opposition to the employees' effort to secure collective bargaining was plainly protected union activity.[16] The Respondent does not deny that grabbing a person by the arm and pulling him about 5 feet from where he had been walking is an assault under Michigan law. (On brief, the Respondent only cites Board cases of more grievous assaults that have been held to be violations, but it suggests no reason why Minor's grabbing Null and pulling him 5 feet should not also be considered an assault.) Such an assault of an employee because of his protected activities is a violation of the Act.[17] I find and conclude that Minor's action was an assault on Null and that it violated Section 8(a)(1), as alleged. Especially because the assault happened in the presence of "plenty" (Minor's word) of other employees, it moreover is the type of conduct that would have interfered with the employees' free choice in the December 3 Board election. I therefore shall also recommend that the Board sustain Objection 8.[18]

Paragraphs 14 and 15 of the Complaint and Objections 6 and 7

Paragraphs 14 and 15 allege that on three separate occasions in November, Minor, Trego, and Vice President of Manufacturing Tom Barr: "disparately enforced its overly broad no-access and no-solicitation and distribution rules by prohibiting an employee from distributing union literature at its employee entrance."

Gerald Ellair (whose case of alleged discrimination is discussed in a subsequent section of this decision) is a first-shift employee of the Industrial Drive facility. Ellair testified that on November 24, about 20 minutes before he was scheduled to report to work, he distributed union literature to employees who were entering or leaving an employee entrance of the Industrial Drive facility. While he was doing so, Plant Manager Minor approached Ellair and told Ellair that he was not to be on company premises more than 10 minutes before or after his shift. Minor also told Ellair, "I hope you don't get yourself in trouble." Ellair did not say anything in response. On cross-examination, Ellair admitted that after Minor spoke to him, Minor went back into the plant; Ellair further admitted that he remained at the entrance, and he presumably continued to distribute literature as he had been doing before Minor arrived. Minor testified, but he did not dispute Ellair on this point; I found Ellair's testimony on the point to be credible.

First-shift Jonesville facility employee Larry Lofton testified that, at some time in November, he came to an exterior entrance of the Jonesville facility plant about 11 p.m. to distribute prounion fliers to the employees of the second and third shifts. Tom Barr, the Respondent's vice president of manufacturing, approached Lofton and asked for a copy of a flyer. After examin-

[15] See *International Automated Machines*, 285 NLRB 1122 (1987), which held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." At trial, the Respondent did not claim that Wall was no longer a supervisor or that she was otherwise unavailable to it. *Cf. Reno Hilton*, 326 NLRB 1421 (1998).

[16] See *Neff-Perkins Co.*, 315 NLRB 1229 fn. 1 (1994), and cases cited infra.

[17] See *Shedd's Food Products*, 293 NLRB 584 (1989), where the Board found a violation because an employee was pushed "four or five feet" because of her protected activities.

[18] See *Garney Morris, Inc.,* 313 NLRB 101 (1993); and *Federated Dept. Stores*, 241 NLRB 240 (1979).

ing the flier, Barr told Lofton that he had to leave. Lofton further testified that:

> I told him at the time that I didn't think that I had to leave by law and he said he wasn't going to get into it with me at that time, I had to leave. [I told Barr that] I wasn't going to leave for another five or ten minutes, and then at that time I would leave and not before. . . . He went back inside and never came back again.

Lofton was not asked when he left the premises that night, but presumably he continued distributing the fliers for at least a few minutes more. Barr did not testify. I found the Lofton's testimony on the point to be credible.

The no-access rule that is contained in the Respondent's handbook is invalid under *Tri-County Medical Center*, as discussed above. The Respondent argues that because neither Ellair nor Lofton ceased handbilling when the supervisors told them to do so, and because they were not disciplined for their protected union activities, there is no violation. Again, success of an employer's attempt to interfere with employees' rights as stated in *Tri-County Medical Center* is not an issue. See *NLRB v. Pizza Crust of Pennsylvania*, as quoted above. Moreover, Minor's statement to Ellair that he "hoped" that Ellair would not get into trouble by violating the Respondent's invalid no-access rule was clearly an unlawful threat to Ellair because he was engaging in protected union activities.[19] In these circumstances I find and conclude that, by Minor's and Barr's attempts to exclude off-duty employees from soliciting or distributing information for the Union in the Respondent's outside nonworking areas, the Respondent violated Section 8(a)(1). I additionally find and conclude that the conduct of Minor and Barr would have tended to interfere with the employees' rights to a fair election, and I shall recommend that the Board sustain Objections 6 and 7 as they pertain to this conduct.

The third incident alleged by paragraphs 14 and 15 of the complaint did involve enforcement of the Respondent's handbook's no-access rule by a proven exclusion of an off-duty employee. Current employee Danny May is a first-shift employee at the Jonesville facility. May testified that once in November he and some nonemployee organizers went to the Jonesville facility and distributed some prounion fliers to employees at night, between the second and third shifts. Trego approached May and told him that he had to leave. May asked Trego if that was a direct order, and Trego replied that it was. May then left the premises (with the organizers still there). When Trego was called as a witness by the General Counsel, he essentially admitted the facts as related by May. I find and conclude that, by Trego's ejecting May from the Respondent's premises because he was an off-duty employee who was engaging in protected solicitations and distributions, the Respondent violated Section 8(a)(1) of the Act. I additionally find and conclude that the conduct of Trego would have tended to interfere with the employees' rights to a fair election, and I shall recommend that the Board sustain Objections 6 and 7 as they pertain to this conduct.[20]

[19] See *Webco Industries*, 327 NLRB 172 (1998).

[20] *Pizza Crust of Pennsylvania*, supra.

Paragraphs 16 and 17 of the Complaint[21]

As noted above, the complaint alleges, and the Respondent denies, that Gary LoPresto and Roger Hartsell are supervisors within Section 2(11) of the Act or agents of the Respondent within Section 2(13). The Respondent classifies LoPresto as a "facilitator," and it classifies Hartsell as a "leadman." Paragraph 16 of the complaint alleges that in November LoPresto posted a notice to employees that stated that the plant would be closed if the employees selected the Union as their collective-bargaining representative. Paragraph 17 alleges that Leadman Hartsell thereafter "permitted the continued posting" of a copy of the same plant-closure notice. At the conclusion of the General Counsel's case, the Respondent moved to dismiss paragraphs 16 and 17 of the complaint on the ground that the General Counsel had not presented prima facie cases that LoPresto and Hartsell were either its supervisors or agents. I granted the motion. On brief, the General Counsel requests reconsideration of those rulings. For the reasons stated infra, I adhere to those rulings. In addition, I find that the Respondent proved in its case that LoPresto did not engage in the conduct, which the complaint attributes to him.

To prove the conduct of LoPresto and Hartsell, the General Counsel called only employee Davis. Davis testified that he and a few other Industrial Drive facility employees regularly conducted Bible-study meetings during breaks. The meetings were usually held in the Respondent's training room, but during a break in November the group found the training room in use. The group (then consisting of Davis and employees Mike Leatherman, Mike Puthoff, Kevin Jones, and Larry Green) went next door to the then-unoccupied office of LoPresto to conduct their meeting. Davis testified that when he entered LoPresto's office, he saw on a wall an antiunion flier, a copy of which was received in evidence. The flier depicts a large padlock that is placed across what appears to be a gate-opening. The legend around the depiction is: "NO—OR THE SHOP WILL BE SHUT DOWN." On direct examination Davis testified that LoPresto's office has windows to a small aisle and to the adjacent training room. That testimony, of course, was designed to leave the inference that the flier could have been seen by someone who was outside LoPresto's office. On cross-examination, however, Davis agreed that the posting could not have been seen from the aisle, but he insisted that it could be seen from the training room. Davis admitted, however, that his pretrial affidavit states unequivocally: "I don't believe you could see this notice unless you went into LoPresto's office." I find that Davis told the truth in his affidavit.[22] Davis further acknowledged on cross-examination that he had no idea when the flier was first posted in LoPresto's office, and he did not know how long it remained there. (Davis testified that he was never again inside LoPresto's office.)

In its case, the Respondent did not call LoPresto. The Respondent did, however, call employee Jones. Jones testified that he created the flier on his home-computer, that he pinned it on LoPresto's wall as the Bible-study group filed into LoPresto's office, that he did so specifically to irritate the prounion Davis, that he told Davis that he had created the flier, that he made a joking offer to make another copy of the flier just for

[21] On brief, the Charging Party does not contend that any of the objections are supported by the evidence that the General Counsel introduced in support of these paragraphs of the complaint.

[22] See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

Davis, that Davis laughed at that joke, and that he (Jones) removed the flier as the group filed out of LoPresto's office at the end of their meeting. The General Counsel did not re-call Davis to rebut any of this testimony, and I found it credible. Even if the General Counsel had proved LoPresto to be a supervisor, I would therefore recommend dismissal of paragraph 16 of the complaint because neither LoPresto nor any other alleged supervisor was involved in the posting of the Jones flier.

As evidence of the supervisory status of LoPresto, the General Counsel relies on Respondent's answer in a prior proceeding. As mentioned above, the General Counsel issued a complaint against the Respondent in Case 7–CA–40911(1) and (2). In that complaint, which issued on July 8, the General Counsel alleged that LoPresto was a supervisor within Section 2(11). Before that prior case settled, David Wilson, the Respondent's vice president of human resources (and a layman), filed an answer that admitted LoPresto's supervisory status. Although the Respondent denied LoPresto's supervisory status in the answer that it filed (by a lawyer) in this case, the General Counsel contends that the Respondent is somehow bound by Wilson's admission in the prior case. The General Counsel cites no applicable authority for such a proposition,[23] and I can see no logic for it. Respondents are not bound in perpetuity by answers that they file. Even if the Respondent had originally admitted LoPresto's supervisory status in this case, it would have had the absolute right to amend such answer and withdraw that admission at any time before the instant hearing began.[24] That absolute right would truly have been rendered meaningless if the Respondent were nevertheless bound by an answer that it had filed in some previous case.

In this case, the General Counsel offered no evidence that LoPresto possessed any of the indicia of supervisory status that are listed by Section 2(11).[25] The most that the General Counsel offered was a May 7 certificate of training that named LoPresto as a "teacher or trainer" for an in-house course in "Quality Manufacturing Training, Gage Operation, Purge Procedure, [and] Request for Change." The General Counsel argues on brief that "it is reasonable to infer" that LoPresto used "independent judgment" under Section 2(11) while giving that training. I disagree; the General Counsel made no attempt to prove what the training actually involved, and there is no basis for such inference.

Finally, the General Counsel argues that testimony by Wilson proves that, even if LoPresto is not a supervisor within Section 2(11), he is an agent of the Respondent within Section 2(13). The testimony of Wilson was no more than that LoPresto trained employees on how to work as a team. The General Counsel asks the Board to infer that during such training LoPresto conveys information to the employees. In so doing, the General Counsel cites *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994), for the proposition that anyone who conveys any information from management is its "conduit" and its agent within Section 2(13). I do not believe that *Debber* can be read so broadly; that case involved an individual who was shown to be a supervisor within Section 2(11) *and* that individual regularly conveyed both job-related messages and personnel messages to employees. In this case, however, there is no evidence that LoPresto ever conveyed personnel (or even job-related) information to the employees when he trained employees to work as a team, much less that he regularly did so.

In support of paragraph 17 of the complaint, Davis further testified that "in late October or early November" he saw another copy of the Jones flier in a production area. Davis started to take it down, but Leadman Hartsell told him not to. Hartsell did not testify, but assuming the truth of Davis' testimony I would nevertheless recommend dismissal of this allegation because the General Counsel did not offer any evidence that Hartsell was a supervisor within Section 2(11) at the time that he told Davis not to take down the Jones filer. On brief, the General Counsel relies on other testimony by Wilson that, "until October of 1998," Hartsell was a "supervisor." Again, Wilson is a layman, and the Respondent is not bound by his use of the word "supervisor," especially in a case where it has formally denied Hartsell's Section 2(11) status. Moreover, Davis placed Hartsell's conduct in "late October or early November." Wilson's undisputed testimony, however, was that Hartsell was a supervisor "until October." That is, Wilson at most admitted that Hartsell was a supervisor through September; Wilson did not admit that Hartsell was a supervisor in October or November. Finally, the General Counsel does not argue that there is any testimony or other evidence that would support a finding that Hartsell was an agent of the Respondent within Section 2(13) at any relevant time; nevertheless, the General Counsel asks on brief for that finding. Without even any putative factual support, of course, I shall recommend dismissal of the agency contention for Hartsell.

For all of the above reasons, I adhere to my rulings and I recommend that the Board affirm my bench dismissals of paragraphs 16 and 17 of the complaint.

Paragraph 18 of the Complaint and Objection 10

Employee Davis further testified that, about 2 weeks before the December 3 Board election, Third Shift Supervisor Julian Cass approached him while he was alone at his work station. According to Davis, Cass "asked me what were my issues and why did I think I needed a union." Davis told Cass that he was having problems with his insurance, that he needed better medical benefits, and that he wanted "fairer treatment of employees" and a "fair contract." Cass directed Davis to see "Sandy," the Respondent's insurance-program administrator. On the basis of this testimony by Davis, the complaint alleges that Cass unlawfully interrogated Davis. Cass did not testify. I found Davis credible on the point, and I conclude that the Respondent did, by Cass' conduct, unlawfully interrogate an employee in violation of Section 8(a)(1). The Charging Party, however, offered no evidence that the interrogation of Davis by Cass was disseminated in any way to other employees. For that reason, and upon the authority of *Antioch Rock & Ready Mix*, supra, and cases cited therein, I shall recommend that Objection 10 be overruled to the extent that it is premised on Cass' conduct.

[23] *American Bakeries Co.*, 280 NLRB 1373 (1986), cited by the General Counsel, dealt with an answer to a complaint that was then before the Board.

[24] See Board Rules and Regulations, Sec. 102.23.

[25] Sec. 2(11) of the Act defines "supervisor" as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Paragraph 19 of the Complaint[26]

Employee Thompson testified that on December 2 he and employee Steven Sheiley distributed union hats between shifts outside a doorway to the Jonesville facility. Thompson testified that, as he and Sheiley were so engaged, a car with four union representatives drove to within a few feet of where they were standing (and well within the Respondent's premises). As Thompson and Sheiley talked to the four union representatives, Supervisors Jack Johnson, Don Diatz, and Mike VanCamp came and stood at the doorway. The supervisors told the union representatives that they had to leave the premises. The union representatives agreed, and the driver started maneuvering the car around in order to point in the direction of the exit. As that was happening, VanCamp asked for a hat, but Thompson refused to give him one. After the union representatives' car got turned around, but before it was driven away, one of the union representatives told the supervisors that they had to leave also. As Thompson testified:

> And they [the Union representatives] stopped and they said, "Well you guys [the supervisors] can't stand out here with the employees."
>
> And then they [the supervisors] said "We know," and they kept standing there and he kept asking me for the hat and things.
>
> And they [the Union representatives] said, "Well, you guys go in and we will leave," and they [the Union representatives] left. And then about forty-five seconds to a minute later then Jack [Johnson] and them [the other supervisors] went back in.

Sheiley did not testify. Based on this testimony by Thompson ,the complaint alleges that the Respondent engaged in unlawful surveillance of its employees' union activities. In its case, the Respondent called none of the three supervisors to testify.

Of course, the supervisors had every right to approach the point inside the Respondent's property line where the union representatives' car had been driven so that the representatives could to talk to Thompson and Sheiley. The supervisors also had a right to stay at that point while the union representatives' car was maneuvered to point toward the exit. This was not unlawful surveillance; nor was standing around for "forty five seconds to a minute" afterwards (for the purpose of making sure that the union representatives were actually leaving, if nothing else). I shall therefore recommend dismissal of paragraph 19 of the complaint.

Paragraphs 21 of the Complaint and Objections 3 and 11

During December 1 and 2, ending more than 24 hours prior to the start of the December 3 Board election, the Respondent conducted a series of compulsory-attendance meetings in which it sought to dissuade the employees from voting for the Union. At 11 p.m. on December 1, William Oeters, Respondent's president, made one such speech to the third-shift employees at the Industrial Drive facility. About 70 employees attended the Oeters meeting (as I shall call it). In addition to Oeters, present for management were Plant Manager Minor, Vice Presidents of Human Resources Trego and Wilson, and Third Shift Foremen McCavit, and Cass. It is undisputed that before the meeting began Oeters told the employees that he was going to make a speech, and he told the employees to hold any questions that they might have until the meeting was finished at which time he would stay and answer their questions individually.

Employee Gerald Ellair was one of the employees in attendance at the Oeters meeting. Ellair, as he usually did, was wearing a shirt that was covered with prounion insignia and a UAW cap. Ellair testified that during Oeters' presentation, employee Jamie Buckner stood and asked a question (the substance of which Ellair did not recall). According to Ellair:

> [Oeters] told [Buckner] to sit down and be quiet. And I had my handbook and I got up and I said, "Well, according to our handbook, page"—think it was 134 and 135; I'm not exact on the pages—"says that we should feel free to ask questions."
>
> And he [Oeters] walked over to me and he pointed at me and he says, "Sit down and shut up now."
>
> I said, "Yes, sir." And I sat down.

Ellair further testified that after this exchange employee Null attempted to ask Oeters a question but Trego, "instructed him to sit down and be quiet." Thereafter, employee Davis and several other employees attempted to ask questions, and they were "ignored." About 5 minutes after the last employee had attempted to ask a question, further according to Ellair, Oeters, "kept going on how bad the unions was and everything, and I remained seated, and I said, 'garbage.'" At that, Oeters pointed to Ellair and told Trego that he wanted a warning notice issued to Ellair. Ellair remained silent for the rest of the meeting.

After the meeting, Trego and Minor escorted Ellair to Minor's office. Minor first told Ellair that he could be discharged; then Minor told Ellair that he could be suspended for 5 days; then Minor told Ellair that he would receive a warning notice. Ellair returned to work. Minor did not dispute this testimony by Ellair.

On December 3 ("after the election," according to Ellair) the Respondent issued Ellair a warning notice that stated as the "Reason for Disciplinary Action Taken":

> During the third shift plant-wide meetings on 12-1-98, at approximately 11:00 p.m., Gerald was instructed to sit down and be quiet so that the rest of the employees could hear the special instructions being given by Bill Oeters. Bill requested that Gerald remain quiet until the end of the meeting and then questions would be answered. Gerald then again was disruptive. Based on the above information, Gerald is being written up.

Although, as will be seen, the Respondent contends that Ellair interrupted the Oeters meeting three times, Ellair testified that he attempted to ask a question only once during the meeting, and his only other remark was the "garbage" comment which he made in a "calm" tone. (Ellair denied that he or the other employees had discussed a plan to disrupt the Oeters meeting by repeatedly trying to ask questions, and there is no evidence that the employee interruptions during the Oeters meeting were the product of some sort of conspiracy.)

Employee Null testified that he sat within 10 feet of Ellair during the Oeters meeting. Null testified that he and employees Buckner and Milt Keys attempted to ask questions, and Oeters or the other supervisors present told them to sit down. Later during the Oeters meeting Ellair attempted to ask a question, and Oeters, according to Null, "[t]old him to sit down and be quiet or they'd write him up." Still later, as Oeters continued

[26] On brief, the Charging Party does not contend that any of the objections are supported by the evidence that the General Counsel introduced in support of this paragraph of the complaint.

his speech, further according to Null: "Gerald made the comment 'garbage,' and Oeters walked over to him and pointed at Gerald, [and] looked at Sam Trego, and said write this man up." Null described Ellair's tone of voice as "quiet to normal." Null further testified that, other than Ellair's one attempted question and his "garbage" comment, Ellair said nothing during the Oeters meeting. Employee Davis testified consistently with Ellair and Null. Based on this testimony by Ellair, Davis and Null, the complaint alleges that the Respondent violated Section 8(a)(3) by issuing the warning notice to Ellair.

The Respondent called Minor and Wilson to testify about the Oeters meeting. Both Minor and Wilson agreed that other employees stood up and attempted to ask questions during the meeting but Oeters told each of them to sit down and hold their questions until after the meeting was completed and he would answer them individually. Both Minor and Wilson testified that the other employees complied, but Ellair did not. Minor and Wisdom testified that Ellair "popped up" three times during the meeting to interrupt Oeters. Wilson testified that Ellair cited the handbook during his first interruption, but Wilson did not testify as to what Ellair said during the other two interruptions. Both Minor and Wilson testified that, after Ellair's second interruption ("popped up," as both Minor and Wisdom phrased it in their testimonies), Oeters told Ellair that he was being insubordinate; Wilson additionally testified that when Ellair interrupted the second time, Oeters told Ellair that if he did not sit down and be quiet, "you're going to be disciplined." Both Minor and Wilson testified that it was after Ellair's third interruption (again, "popped up," as both Minor and Wisdom phrased it) that Oeters told Trego to issue a warning notice to Ellair. Wilson testified: "That chilled the crowd."[27]

Whether Ellair interrupted Oeters three times or only twice is the only factual resolution that is required. I find that the "garbage" interruption was only Ellair's second because: (1) the above-quoted warning notice's failure to indicate that Ellair interrupted three times is a tacit admission that he did so only twice; (2) Wilson and Minor (most suspiciously) testified that Ellair "popped up" three times, but they made no attempt to relate what Ellair had said when he "popped up" the second (or third) time; (3) the Respondent did not call to testify any of the 4 other managers who were present; and (4) the General Counsel's witnesses were credible on the point. Nevertheless, Ellair's "garbage" comment was, in fact, an interruption; although Ellair spoke in a moderate tone, he had no reason for making the "garbage" comment other than to interrupt, and challenge, Oeters.

In summary, the employees were told as a group that they could not ask questions or otherwise interrupt the Oeters' meeting. When Ellair first interrupted, he was individually and categorically warned orally that he would receive a warning notice if he did so again. (As employee Null put it, Oeters "[t]old him to sit down and be quiet or they'd write him up.") Ellair then interrupted again. As a result, the Respondent issued Ellair a warning notice. The issue before the Board is whether Ellair's second interruption of the Oeters' meeting was protected to the extent that the Respondent could not lawfully issue him a warning notice because of that interruption, even though Ellair had ignored a specific, individual, oral warning that he would receive such a written warning if he interrupted the Oeters meeting again.

In several cases, the Board has held that Section 7 affords employees a degree of latitude that insulates them from suspensions or discharges for impulsive interruptions during compulsory-attendance employer campaign meetings if those interruptions fall short of violence or extreme cursing and if those interruptions are not the product of an employee conspiracy to disrupt such meetings. *F. W. Woolworth Co.*, 251 NLRB 1111 (1980), and *Beverly California Corp.*, 326 NLRB 232 (1998), are two of those cases. On brief, the General Counsel relies heavily upon *Woolworth* and *Beverly* for the proposition that neither may an employer lawfully issue to an employee a warning notice for repeated interruptions of an employer campaign meeting, even if the employee has disregarded a prior oral warning of that discipline. Neither *Woolworth* nor *Beverly*, however, involved an issuance of the milder discipline of a warning notice for employee disruptions of employer speeches.[28] Indeed, the General Counsel cites no case in which repeated employee disruptions of employer campaign speeches have been held to be activity that is protected from receiving warning notices.[29] Certainly, the General Counsel does not cite any case that holds that repeated disruptive employee conduct during an employer campaign meeting is protected from the discipline of a warning notice, even when that employee has ignored a specific oral warning that he would receive a written warning if his disruptive conduct continues. Therefore, the General Counsel is asking the Board to establish such a precedent in this case.

The unprecedented ruling that the General Counsel seeks is that an employer may not issue a warning notice to an employee because of that employee's repeated disruptions of a working time employer campaign meeting, even where the employee has ignored a prior oral warning that a written warning would be forthcoming on the occasion of the employee's next interruption. Because there is precious little else that an employer can effectively do to exercise his right to make a speech in the face of repeated disruptions, the granting of General Counsel's request would result in law that *any* discipline of an employee for disrupting an employer campaign speech is a per se violation of the Act. I do not believe that such law should be established.

A per se rule that employers may not impose any discipline on employees for disruptions of employer campaign meetings would leave employees free to engage in repeated cat-calls, foot-stomping, whistling or other such conduct that would effectively deprive employers of their rights under Section 8(c) of the Act to make campaign speeches.[30] If an employer cannot at

[27] I grant the motions of the General Counsel and the Charging Party to correct Tr. 451, l. 22, to change "showed" to "chilled."

[28] In *Beverly*, moreover, the administrative law judge, with subsequent Board approval, characterized the suspension as an "overreaction," plainly leaving the inference that the Act does not prohibit all discipline for speech-disrupting employee conduct.

[29] *Fall River Savings Bank*, 247 NLRB 631 (1980), the only case cited by the General Counsel for the proposition that issuance of a warning notice in such circumstances is tantamount to a suspension or a discharge, involved the issuance a warning notice for employee conduct during an impromptu confrontation on a work floor when the employer was trying to get employees to go back to work; the case did not involve an employer campaign speech or interruptions of such a speech.

[30] Sec. 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor

least categorically warn orally an individual employee of the punishment of a warning notice for interruptions that tend to impair that employer's ability to give a lawful speech on paid employee time, and if that employer cannot follow up on such a categorical warning with the comparatively mild punishment of such a warning notice when the employee ignores the oral warning and interrupts again, an employer effectively has no right to give campaign speeches, even when it is paying employees to listen to them.

The General Counsel argues that Ellair's case should be analyzed under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Wright Line*, however, does not apply to a situation in which an employee engages in a general course of protected concerted activities, as Ellair did when he (twice) interrupted the Oeters meeting,[31] and the employer disciplines that employee allegedly because some aspect of the employee's conduct exceeded the protection of the Act. Instead, as observed by the Board in *Mast Advertising*, 304 NLRB 819 (1991), such cases are to be analyzed under *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). *Thor Power Tool* holds that "an employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect." This, ultimately, is the standard to be applied to the warning that the Respondent issued to Ellair, as I have done. Moreover, assuming that *Wright Line* did apply, I would find that the General Counsel has not presented a prima facie case of discrimination against Ellair. It is true that Ellair was wearing many prounion insignia (buttons, etc.) when he interrupted Oeters and Ellair was the only interrupting employee who was disciplined. Nevertheless, the General Counsel did not show that the other employees who interrupted Oeters were not wearing such insignia. Moreover, there is no evidence of disparate treatment because the General Counsel did not show that any other employee interrupted Oeters *twice* and was not punished.

In this case it is true that Minor essentially admitted Ellair's testimony that, after the Oeters' meeting, he was brought to an office where Minor threatened him with suspension and discharge. It is also true that of *Beverly*, supra, fn. 5, the Board found an 8(a)(1) violation in such a threat of suspension. The threats by Minor, however, were not alleged, and the General Counsel does not ask on brief for finding of a violation in that respect. I am constrained to point out, however, that even if Minor's postmeeting threats to Ellair of harsher discipline had been alleged, and even if I were to find 8(a)(1) violations in Minor's conduct, Section 7 would not somehow retroactively render Ellair's conduct protected from the warning notice that Oeters had previously ordered.

The Respondent did not discharge or suspend Ellair for his "garbage" interruption of the Oeters' meeting. Rather, the Respondent issued to Ellair the comparatively mild discipline of a warning notice, and it did so only after Ellair had ignored a specific oral warning that the written warning would be forthcoming if he interrupted the Oeters' meeting again. The warning notice was not followed by a discharge, or a suspension, or any other discipline that would have immediately affected Ellair's tenure of employment. The warning notice, therefore, appears to have been no more than that which was necessary to allow Oeters to complete his presentation to the employees. I shall therefore recommend that paragraph 21 of the complaint be dismissed. I shall further recommend that the Board overrule the Union's Objection 11, which is premised on the alleged unlawfulness of the warning notice to Ellair.

The Union's Objection 3 is premised on Oeters' threat to issue the warning notice to Ellair. The complaint did not allege, and the General Counsel does not ask for a finding, that Oeters' threat to Ellair of a warning notice violated Section 8(a)(1). Perhaps it is needless to say, but even if such allegation had been made I would find that Oeters' threat to Ellair of the discipline of a warning notice did not violate Section 8(a)(1); if Oeters had a right to order the issuance of the warning notice to Ellair, he necessarily had a right to threaten to do so. For this reason, I shall recommend that the Board overrule the Union's Objection 3.

Objection 12

The December 3 Board election was conducted in the Respondent's training room, the door to which is on the north side of an east-west aisle that runs along the front of the production area of the Industrial Drive facility. According to the scale of a diagram of the plant that was received in evidence, the aisle is about 100 feet long and 4 feet wide (at its narrowest point). The training room door is about 20 feet from the east end of the aisle; a door to a supervisors' room is about 20 feet west of the training room door; a door to the lunchroom is about 30 feet west of the supervisors' office, or about 50 feet from the training room door. Two voting periods were conducted in order to allow employees of all three shifts to vote. The first polling period was from 5:30 until 8 a.m.; the second polling period was conducted at some time after the second shift began work that afternoon.

Employee Davis testified that he worked the third shift on the night of December 2–3. Several minutes before the shift-end at 6:50 a.m., he went to the training room to vote. After voting, he returned to his work area. As he started to leave the plant at shift-end, he walked to a point where he could see other employees who were in the aisle, lined up to vote, at the door of the training room. Davis testified that at the time: "I observed [Supervisors] Jim Cole and John Burkhart; they were down by the . . . entrance to the training room; and they were standing there and they had talked to several employees and talked amongst themselves." Davis testified that Cole and Burkhart were within 5 feet of the training room door as they did this. On cross-examination, Davis admitted that, before the voting period began, his shift had received orders to wait until their production lines were released to vote; Davis further admitted that the third shift followed that orderly procedure. Davis further admitted that, as the first shift employees arrived, they did not report to their work areas (to be released by production lines); instead they went immediately to the voting line where they became "very jubilant," but not loud. Employee Null testified that at the shift change on the morning of December 3 he saw Cole, Burkhart, and Supervisor Steve George standing "approximately 30 feet" from the training room door, speaking to employees before or after they had voted. Neither Davis nor Null were asked to estimate how long it was that they saw Cole and Burkhart standing in the aisle. Both Davis and Null admitted that they did not hear what Cole and Burkhart said to any of

practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

[31] See *Neff-Perkins*, supra.

the employees who were in the aisle that morning. It is upon this testimony by Null and Davis that Objection 12, as quoted above, alleges that the Employer engaged in improper electioneering at or near the polls.

Neither Burkhart nor George testified. Wilson testified that he came to the aisle after he received a report that the first-shift employees were not going to their work areas and working until they were released by production lines to go and vote. Rather, the report was that some of the first-shift employees were going individually to the voting area where they were making a great deal of noise while waiting to vote. Wilson went to the door to the supervisors' office where he found "the day-shift supervisors" (apparently all of them) who did not know what to do about the fact that the employees had not followed the voter-releasing instructions. Wilson told the supervisors to walk further away from the training room door; they walked in the aisle to the area of the lunch room door and conferred.[32] Wilson told the supervisors not to attempt to get the employees who were already lined up at the training room door to go back to work; he further told the supervisors to go and tell the other employees who were working that they could go to vote at any time that they wished. Cole testified consistently with Wilson; Cole denied being within 10 feet of the training room door; and he denied speaking to any employees who were waiting to vote.

I credit the testimonies of Wilson and Cole that they were in the aisle only momentarily during the voting period, that they were there to investigate reports that employees were not waiting to be released by production lines to vote, and that they stayed reasonably far away from the training room door. I further credit Cole's testimony that he did not speak to any employees who were waiting to vote. Although neither Burkhart nor George testified, Cole was credible in his testimony that George stayed in the same area that he did. Under these circumstances, including the circumstance that no witness for the Charging Party could testify as to what the supervisors may have said to the voters, I find that Objection 12's claim that the supervisors engaged in impermissible electioneering is not supported by the evidence.

In fact, on brief the Charging Party does not contend that supervisors engaged in electioneering. Rather, citing *ITT Automotive*, 324 NLRB 609 (1997), the Charging Party claims that the supervisors' being in the aisle would have made the employees feel "under the glass" of the Employer. This is a contention of improper surveillance, something that is not raised by Objection 12. Assuming, however, that the surveillance allegation is properly raised by that objection, I would nevertheless overrule it.

Wilson and Cole were credible in their testimonies that they were taken by surprise when they saw that the first-shift employees were proceeding individually to the polling area and not waiting to be released in order. They were further credible that the supervisors remained in the aisle only long enough to decide what to do about it; also, as they deliberated, they moved further away from the polling area, not closer. Such conduct could not have given any employees the impression that their voting was under surveillance. Moreover, *ITT Automotive,* as cited by the Charging Party, is not authority for the proposition that supervisors engage in objectionable conduct if they are ever in a position to see employees going to, or coming from, the polls. *ITT Automotive*, in turn, cites *Performance Measurements Co.*, 148 NLRB 1657, 1659 (1964), in which the Board held that "the continued presence of the [employer's] president at a location where the employees were required to pass in order to enter the polling place was improper conduct" and that "by this conduct the [employer] interfered with the employees' freedom of choice in the election." The administrative law judge in *ITT Automotive* quoted this language of *Performance Measurements* and, with Board approval, also turned his decision on the "continued presence" of supervisors in the polling area to find that the free choice of the employees had been interfered with. In both *ITT Automotive* and *Performance Measurements,* the employer agents had systematically maintained their presence in the areas leading to the polls throughout all, or nearly all, of the voting periods. On brief, the Charging Party does not mention *Performance Measurements*, and the Charging Party excises from its quotations of *ITT Automotive* that case's emphasis on the element of the "continued presence" of employer agents in the polling area. Of course, the absence of that critical element cannot be ignored. I will therefore recommend that the Board overrule the Union's Objection 12.

[32] The Tr. 455, l. 15, is corrected to change "A" to "8."

CONCLUSIONS OF LAW

1. By the following acts and conduct Respondent has violated Section 8(a)(1) of the Act:

(a) Since on or about June 17, the Respondent has maintained in effect, and has enforced, a work rule prohibiting off-duty employees from gaining access to its parking lots, gates and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(b) In August, Swander threatened an employee with plant closure if the employees selected the Union as their collective-bargaining representative.

(c) In October, McCavit interrogated an employee about his union membership, activities, or desires.

(d) In October, McCavit threatened an employee with plant closure if the employees selected the Union as their collective-bargaining representative.

(e) In November, McCavit enforced against an employee the Respondent's work rule prohibiting off-duty employees from gaining access to its parking lots, gates, and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(f) In November, Minor assaulted an employee because he had engaged in protected concerted or union activities.

(g) In November, Minor enforced against an employee the Respondent's work rule prohibiting off-duty employees from gaining access to its parking lots, gates, and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(h) In November, Barr enforced against an employee the Respondent's work rule prohibiting off-duty employees from gaining access to its parking lots, gates and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(i) In November, Trego enforced against an employee the Respondent's work rule prohibiting off-duty employees from gaining access to its parking lots, gates and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(j) In November, Cass interrogated an employee about his union membership, activities, or desires.

(k) On November 30, the Respondent issued a notice that threatened employees with arrest if they violated its work rule prohibiting off-duty employees from gaining access to its parking lots, gates, and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(l) On November 30, the Respondent promulgated, and thereafter maintained in effect, a rule that prohibited employees from going without management's prior permission to any of the Respondent's facilities at which the employees did not work for the purposes of engaging in protected solicitations or distributions.

(m) On November 30, the Respondent promulgated, and thereafter maintained in effect, a rule that prohibited solicitations for the Union by employees who are in working areas during nonworking times.

1. The Respondent has not otherwise violated the Act as alleged in the complaint.

2. The Union's Objections 5, 6, 7, and 8 to conduct of the Employer that affected the results of the December 3 Board election are valid and shall be sustained.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Eagle-Picher Industries, Inc., Hillsdale Tool and Manufacturing Co. Division, Hillsdale and Jonesville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with plant closure if they select the Union as their collective-bargaining representative.

(b) Interrogating its employees about their union membership, activities, or desires.

(c) Maintaining in effect, or enforcing, any work rule prohibiting off-duty employees from gaining access to its parking lots, gates and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(d) Threatening its employees with arrest if, while off duty, they enter its parking lots, gates, or other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(e) Promulgating or maintaining in effect any rule prohibiting employees from going without management's prior permission to any of the Respondent's facilities at which they do not work for the purposes of engaging in protected solicitations or distributions.

(f) Promulgating or maintaining in effect any work rule prohibiting employees who are in working areas during nonworking times from engaging in solicitations for the Union.

(g) Assaulting any employee because he or she had engaged in protected concerted or union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its work rule prohibiting off-duty employees from gaining access to its parking lots, gates, and other outside nonworking areas for the purposes of engaging in protected solicitations or distributions.

(b) Rescind its work rule prohibiting employees from going without management's prior permission to any of the Respondent's facilities at which the employees do not work for the purposes of engaging in protected solicitations or distributions.

(c) Rescind its work rule prohibiting employees who are in working areas during nonworking times from engaging in solicitations for the Union.

(d) Within 14 days after service by the Region, post at its facilities in Hillsdale and Jonesville, Michigan, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to each current employee and former employee employed by the Respondent at any time since June 17, 1998, the date of the first unfair labor practice found herein.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on December 3, 1998, in Case 7–RC–21284 is set aside and that that case is severed from Case 7–CA–41632 and remanded to the Regional Director for Region 7 of the Board for the purpose of conducting a new election at such time as he or she deems that the circumstances permit the employees' free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with plant closure if you select International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO as your collective-bargaining representative.

WE WILL NOT interrogate you about your union membership, activities, or desires.

WE WILL NOT maintain in effect, or enforce against you, any work rule prohibiting off-duty employees from gaining access to our parking lots, gates or other outside nonworking areas for the purposes of engaging in solicitations or distributions that are protected by the Act.

WE WILL NOT threaten you with arrest if, while off duty, you enter our parking lots, gates or other outside nonworking areas for the purposes of engaging in solicitations or distributions that are protected by the Act.

WE WILL NOT promulgate, or maintain in effect, or enforce against you, any work rule prohibiting you from going without management's prior permission to any of our facilities at which you do not work for the purposes of engaging in solicitations or distributions that are protected by the Act.

WE WILL NOT promulgate or maintain in effect any work rule prohibiting employees who are in working areas during nonworking times from engaging in solicitations for the Union.

WE WILL NOT assault you because you have engaged in protected concerted or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL rescind our work rule prohibiting off-duty employees from gaining access to our parking lots, gates, or other outside nonworking areas for the purposes of engaging in solicitations or distributions that are protected by the Act.

WE WILL rescind our work rule prohibiting you from going without management's prior permission to any of our facilities at which you do not work for the purposes of engaging in solicitations or distributions that are protected by the Act.

WE WILL rescind our work rule prohibiting employees who are in working areas during nonworking times from engaging in solicitations that are protected by the Act.

EAGLE-PICHER INDUSTRIES, INC., HILLSDALE TOOL AND MANUFACTURING CO. DIVISION